IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3746 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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RAFIKKHAN HUSAIN KHAN PATHAN

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 3746 of 2001

MS KRISHNA U MISHRA for Petitioner No. 1

Mr. H.L. Jani, AGP Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 02/07/2001

ORAL JUDGEMENT

Heard learned advocate Ms. Krishna Mishra, for the petitioner and Mr. Jani, learned AGP for the respondent State. In this petition, the petitioner has challenged the impugned order of detention dated

13.9.2000 passed by the detaining authority under section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA Act" for short). The grounds of detention have been communicated to the petitioner under section 9(1) of the PASA Act and the petitioner has been detained at Bhavnagar Jail as Class II Detenu. Two offences being Bapunagar Police Station CR No. 0178 of 2000 and 0278 of 2000 of the same police station dated 7.6.2000 and 26.8.2000 respectivel have been registered against the petitioner for the offences punishable under section 457, 380 and 114 of the Penal COde has been registered against the petitioner. At the time of passing of the impugned order of detention, the petitioner was in police custody by way of remand and the statements of the secret witnesses were recorded on 10th September 2000 and 11th September, 2000 and were verified by the detaining authority on 12th September, 2000 and, thereafter, the impugned order of detention has been passed by the detaining authority on13.9.2000. The detaining authority has claimed privilege under section 9(2) of the PASA Act. The petitioner has been considered as a dangerous person as defined under section 2(c) of the PASA Act. The respondent State has not filed reply to the present petition.

Learned advocate Ms. Mishra has raised various contentions challenging the impugned order of detenion. However, according to her, two contentions are enough for setting aside the impugned order of detention. The first contention raised by Ms. Mishra is that at the time of passing of the impugned order of detention, the petitioner was in custody by way of remand as mentioned in the grounds of detention and the statements of the secret witnesses recorded on10th and 11th September, 2000 were verified by the detaining authority on 12.9.2000 and on the very next day i.e. on 13.9.2000, the impugned order of detention has been passed by the detaining authority in mechanical and routine manner without verifying the genuineness of the statements which were made by the secret witnesses and, therefore, according to her, the impugned order of detention is required to be quashed and set aside. She has placed reliance upon two decisions. She has relied upon the decision of this Court in case of Ranubhai Bhikhabhai Bharwad (Vekaria) versus State of Gujarat reported in 2000(3) GLR page 2696. She has also relied upon the two decisions of the apex court on the ground that at the time of passing of the impugned order of detention, the petitioner was in police custody by way of remand. One is the decision in case of Ramesh Yadav versus District Magistrate and another (supra) reported in 1985 (4) SCC 232 and the other one is the decision in case of Amrutlal and others

versus Union of India reported in 2000(1) SCC 341.

Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there is no bar in passing the order of detention of a person while police custody. He has also submitted that the detailed affidavit in reply has been filed by the State Government explaining the situation and, therefore, according to Mr. Jani, the impugned order of detention has rightly been passed by the detaining authority and, therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

I have considered the arguments of the learned advocates for the respective parties. I have considered the two contentions raised by the learned advocate Ms. Mishra, that at the time of passing of the order of detention, the petitioner was in police custody.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offence registered against him. There is

no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail after completion of the period of remand and to indulge in the same activities again after release on bail.

In case of Amratlal and others versus Union of India (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the Bombay Prohibition Act.

There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this

decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as

much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exericse of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

Looking to the observations made hereinabove, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 13.9.2000 is vitiated and resulted to quash and set aside. The detenu Rafik Khan Hushenkhan Pathan who has been detained at the Bhavnagar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

2.7.2001. (H.K. Rathod,J.)
Vyas